No. 76-157

In the Supreme Court of the United States

OCTOBER TERM, 1976

PASQUALI INTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of his conviction for income tax evasion and filing false tax returns, challenging the sufficiency of the evidence and contending that there was an inadequate opening net worth figure for the computation of his unreported income by the expenditures method.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of attempted tax evasion for the years 1968 through 1971 and of filing false tax returns for the same years, in violation of 26 U.S.C. 7201 and 7206(1). The trial court sentenced him to concurrent prison terms of five years on the evasion counts and three years on the false returns counts and fined him $30,000 (Pet. 4).

The pertinent evidence may be summarized as follows: During the prosecution years, 1968-1971, petitioner was a lieutenant on the New York City Police Force and had served on the force for many years before that time (Tr. 92).[1] The government's proof, which was based on the expenditures method (see *United States* v. *Johnson*, 319 U.S. 503; *Holland* v. *United States*, 348 U.S. 121), showed that petitioner realized more than $94,000 in unreported income during the four prosecution years (Govt. Ex. 250; Tr. 1080-1084, 1090-1093) and had underpaid his taxes by more than $34,000 (Tr. 1097-1100). The evidence showed a consistent pattern of substantial understatements of income in each year (Govt. Ex. 250), and further showed that petitioner customarily dealt in large amounts of currency (Tr. 480-481, 802, 806, 880-881, 892, 896, 948, 964) and incurred extraordinary expenditures of more than $200,000 during the four-year period (Govt. Ex. 250). Petitioner claimed that the funds in question were undeposited cash supplied to him by his relatives (Tr. 17-20). However, the government's evidence demonstrated that petitioner did not receive cash from relatives, so that his expenditures in excess of reported income must have come from unreported taxable income.

1. Petitioner contends (Pet. 7-12) that the government failed to establish an opening net worth figure for its expenditures computations. In petitioner's view, the government's proof did not negate the possibility that the funds in question may have arisen from a hoard of undeposited cash accumulated by petitioner before the prosecution years. But the evidence adduced at trial demonstrated that petitioner's resources at the start of 1968 did not and "could not have contributed at all to his

[1]"Tr." refers to the transcript of trial proceedings.

expenditures during the tax years" in question. *United States* v. *Bianco*, 534 F. 2d 501, 504 (C.A. 2). Thus, for example, petitioner's ex-wife of 11 years, from whom he was divorced in April 1968, testified that under the separation agreement she received the bulk of the marital property, including the $6,000 balance in a joint savings account (Tr. 94), a half-interest in the family home, and the family car (Tr. 91-94). She further stated that she knew of no assets available to petitioner (other than those accounted for by the government) nor of any substantial amount of cash available to him at the time of the divorce (Tr. 96-97, 114). Since petitioner's ex-wife had an interest in learning the details of her husband's finances before entering into a financial settlement, her testimony was persuasive evidence of petitioner's financial condition as of the beginning of 1968.

However, the government's investigation went further. In order to determine whether petitioner had inherited any assets for which he had not been credited, the Internal Revenue Service checked the records of the Surrogate's Court in the five counties of New York City, as well as other counties in which his relatives resided (Tr. 999). The Service made similar inquiries to ascertain whether petitioner had obtained any assets through purchase or sale of property, including chattel mortgates (Tr. 999-1000). Further inquiries were made at the central indices of larger banks of New York City, as well as banks in the vicinity of petitioner's home, his place of employment, and areas where he cashed payroll checks (Tr. 1001). Finally, inquiries were made to major credit agencies to discover possible loans, gift tax returns were examined and the New York Insurance Index Bureau was checked to determine whether petitioner or his wife had received any insurance settlements. The responses to all of these inquiries were negative (Tr. 1002-1003).

The evidence suggesting that petitioner had no substantial amount of cash on hand was buttressed by petitioner's failure to establish the existence of any such cash hoard. At trial, petitioner agreed that his case would stand or fall on the testimony of his mother, his brother, and his mother-in-law, all of whom were called by the government as part of its case-in-chief (Tr. 20). But these various relatives, some of whom had meager incomes, could not satisfactorily explain how they could have provided petitioner with funds or why they kept these purported amounts of cash at home instead of in banks with their other funds (Tr. 220-229, 284-285, 622). The jury was therefore amply justified in concluding that petitioner's extraordinarily large cash expenditures arose from current unreported taxable income. *United States* v. *Adonis*, 221 F. 2d 717 (C.A. 3).

2. Petitioner further argues (Pet. 12-13) that the trial court erred in admitting evidence that in 1975, after the Internal Revenue Service's investigation had begun, petitioner asked an automobile salesman to falsify an invoice in order to show a purchase price of $5,500 rather than the true figure of $8,750 (Tr. 890-891). But this evidence was properly admitted for only limited purposes and was accompanied by a cautionary instruction to the jury by the court (Tr. 891-892). It is well established that evidence relevant to the issue of willfulness in an income tax evasion case, even when it relates to conduct subsequent to the indictment period, is admissible. See, *e.g.*, *Bateman* v. *United States*, 212 F. 2d 61, 66 (C.A. 9); *United States* v. *Rischard*, 471 F. 2d 105, 109 (C.A. 8); *United States* v. *Taylor*, 305 F. 2d 183, 185 (C.A. 4), certiorari denied, 371 U.S. 894. See also *Black* v. *United States*, 309 F. 2d 331, 337 (C.A. 8), certiorari denied, 372

U.S. 934. Here, the evidence showed a continuing pattern of cash transactions, and an affirmative act to conceal one such transaction.

3. Petitioner also contends (Pet. 13-14) that the trial court erred in permitting the government to reopen its case and introduce two additional bank exhibits, which the prosecutor admitted he had "neglected" to offer as part of his case-in-chief (Tr. 1137). These exhibits negated the possibility that $2,100 of the unreported income might have resulted from the withdrawal of funds from those accounts by petitioner (Tr. 1138-1142). However, a trial court has broad discretion to permit a party to reopen its case. *United States* v. *Zeid*, 281 F. 2d 825, 829 (C.A. 3), certiorari denied, 364 U.S. 901; *United States* v. *Kenner*, 354 F. 2d 780, 784 (C.A. 2), certiorari denied, 383 U.S. 958; *Simsirdag* v. *United States*, 315 F. 2d 230, 231 (C.A. 5). Here, the court's action was well within its discretion; the introduction of the exhibits did not unfairly surprise petitioner, no further preparation was necessary to meet the evidence, and petitioner did not request a continuance. See *Massey* v. *United States*, 358 F. 2d 782, 786 (C.A. 10).

4. Finally, petitioner argues (Pet. 14-15) that the prosecutor made an improper comment in his summation to the jury with respect to petitioner's failure to take the witness stand in his own behalf. But the prosecutor's remark (Pet. 14; Tr. 1257) did not comment on petitioner's refusal to testify; it simply pointed out that the government's evidence of lack of a prior cash hoard accumulated by petitioner was uncontradicted. The statement was therefore proper. See *Banks* v. *United States*, 204 F. 2d

666, 672 (C.A. 8); *Baker* v. *United States*, 115 F. 2d 533, 544 (C.A. 8), certiorari denied, 312 U.S. 692.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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[2]Contrary to petitioner's contention (Pet. 15), the trial judge's characterization of the case as "unusual" (Tr. 1289) is not reversible error. There is no suggestion that the court's characterization unfairly cast doubt on the credibility of petitioner's relatives.